

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(FORT LAUDERDALE DIVISION)

Case No. 02-60636-CIV-GRAHAM/GARBER

BARBARA NAILS,

Plaintiff,

vs.

JAMES CARY JACOBSON, P.A. and
ROBIN SOBO MOSELLE, P.A.
as copartners doing
business as JACOBSON SOBO & MOSELLE,
JAMES CARY JACOBSON, P.A., JAMES CARY
JACOBSON, KELLY SERVICES, INC.
RSKCO SERVICES, INC., and CONTINENTAL
CASUALTY COMPANY,

Defendants.

NIGHT BOX
FILED

SEP 19 2002

CLARENCE MADDOX
CLERK, USDC/SDFL/FTL

PLAINTIFF BARBARA NAILS' RESPONSE TO ORDER TO SHOW CAUSE,
INCLUDING NOTICE OF FILING RETURNS OF SERVICE ON DEFENDANTS
JUSTIN D. JACOBSON, RSKCO SERVICES, INC., KELLY SERVICES, INC.,
CONTINENTAL CASUALTY COMPANY, AND ATTENTION, LLC

Plaintiff, Barbara Nails, hereby responds to this court's
September 19, 2002, Order to Show Cause.

As a threshold issue, Plaintiff has attached Returns of
Service on Defendants Justin D. Jacobson ("J.D. Jacobson"), RSKCo
Services, Inc. ("RSKCO"), Kelly Services, Inc. ("Kelly"),
Continental Casualty Company ("Continental"), and Attention, LLC
("Attention") as Exhibits "A"-"E", all of which have been
recently served, except for Attention, with whom Plaintiff has
settled.

I. Procedural background

On May 7, 2002, PLAINTIFF filed the Complaint in this action, alleging violations of the Fair Debt Collections Practices Act ("FDCPA") and a breach of a settlement agreement concerning the underlying alleged debt. On June 3, 2002, PLAINTIFF filed an Amended Complaint to add RSKCO and Continental as defendants related to the breach count, and on September 4, this court deemed Plaintiff's Second Amended Complaint (Doc. 10), which added James Cary Jacobson, P.A. ("J.C. Jacobson, P.A.") and Robin Sobo Moselle, P.A. ("RSM, P.A.") as defendants, filed as of that date. Doc. 9. PLAINTIFF has since settled with DEFENDANTS ATTENTION, LLC ("ATTENTION"), STEVEN MICHAELS, and DOES 1 through 3, who were not named in the Second Amended Complaint (Doc. 10). J.D. Jacobson and RSKCO were served on September 4, Continental was served on September 3, Kelly was served on August 27, and Attention was served on July 8. J.C. Jacobson, J.C. Jacobson, P.A., and RSM, P.A. remain unserved, though earlier in the same day that the undersigned received the subject Order to Show Cause, he had prepared summonses for issuance by the court on said defendants.

II. Facts

On May 24, 2002, Plaintiff's undersigned attorney mailed Defendant James Cary Jacobson ("J.C. Jacobson") a copy of the Amended Complaint in this action. See Exhibit "F". On June 19, the undersigned called J.C. Jacobson, who referred the

undersigned to his son and co-defendant, J.D. Jacobson to discuss the matter, and on that same day, the undersigned attorney spoke with J.D. JACOBSON. J.D. JACOBSON informed the undersigned that the defendant parties related to his law firm were not properly named, but did not specify how. The undersigned subsequently underwent an investigation into the records of the Division of Corporations, and believes the law firm parties are now properly named. On June 24, J.D. Jacobson informed the undersigned that he would accept service, but that he wanted the undersigned to fax him the original Complaint. The undersigned duly faxed J.D. Jacobson the original Complaint, but neither J.D. Jacobson, nor any of the defendants in his law firm (J.C. Jacobson, J.C. Jacobson, P.A., RSM, P.A., and Jacobson, Sobo & Moselle) have appeared.

III. Argument

The 120-day period after the filing of the original Complaint ended on September 4, 2002. Thus, there is no issue whatsoever as to timely service upon J.D. Jacobson, RSKCO, Continental, Kelly, or Attention.

As to J.C. Jacobson, P.A. and RSM, P.A., those parties were not named in this action until the filing of the Second Amended Complaint. The 120-day limit under F.R.C.P. 4(m) should be construed to run from the filing of the an amended complaint, at least where a new defendant is added. McGuckin v. United States, 918 F.2d 811 (9th Cir. 1990); Johnson v. United States, 152

F.R.D. 87 (E.D. La. 1993). To interpret the rule otherwise would restrict the time available for adding defendants to within 120 days after commencement, and such a result would contradict the relation-back provisions of F.R.C.P. 15(c). See McGuckin; Johnson. Thus, the 120-day limit did not even begin to run against J.C. Jacobson, P.A. or RSM, P.A. until September 4.

As for Jacobson, Sobo & Moselle ("JSM"), Plaintiff is under the belief that it is a partnership whose partners are J.C. Jacobson, P.A. and RSM, P.A..¹ Under Florida law, process against a partnership shall first be served on any partner or any designated employee if the partner is not available during business hours. See § 48.061(1), Fla. Stat.. While service of process on a partnership under F.R.C.P. 4(h) is also permissible, it does not appear that in practicality the federal rule expands the universe of those Plaintiff could have served. Thus, without knowing the identity of the partners, Plaintiff could not serve JSM. Even more importantly, without statutory authority to the contrary, under Florida law partnerships are not legal entities and are to be named in suits under the names of their partners, see Aronovitz v. Stein Properties, 322 So.2d 74 (Fla. 3rd DCA 1975); Elting Center Corp. v. Diversified Title Corp., 306 So.2d 542 (Fla. 3rd DCA 1974), cert. den. 321 So.2d 554 (1975), and in the instant case, the partners, if they are yet properly named, were not properly named until September 4. Thus, JSM could not

¹ While J.D. Jacobson did inform Plaintiff that the defendant law firm parties were not correct, he did not see fit to correct any such deficiency.

be served until September 4.

As for J.C. Jacobson, it is true that the 120-day limit expired on September 4. However, dismissal is not mandatory under F.R.C.P. 4(m). If Plaintiff shows good cause for the failure to serve within the 120 days, the court "shall" extend the time for filing. Even if good cause is not shown, the court, in its discretion, may "direct that service be effected within a specified period of time." F.R.C.P. 4(m). See Petrucelli v. Bohringer & Ratzinger, 46 F.3rd 12398 (3rd Cir. 1995); Espinoza v. United States, 52 F.3rd 838 (10th Cir. 1995); Vergis v. Grand Victoria Casino & Resort, 199 F.R.D. 216 (S.D. Ohio 2000).

Plaintiff argues that good cause existed for the failure to serve J.C. Jacobson. However, even if this court does not believe that Plaintiff is hereby showing good cause, Plaintiff at least can show some cause why the action should not be dismissed as to J.C. Jacobson.

First, as to some cause, if this action is dismissed, the claims against J.C. Jacobson will be time-barred. J.C. Jacobson is a defendant for only the claims under the Fair Debt Collections Practices Act ("FDCPA"). Under the FDCPA, claims must be brought within one-year of the violation. 15 U.S.C. § 1692k(d). Plaintiff has alleged that J.C. Jacobson's violation occurred on May 9, 2001. See Doc. 10, at ¶ 18.

"Relief [in the absence of good cause] may be justified ... if the applicable statute of limitations would bar the refiled action." See F.R.C.P. 4(m) Advisory Committee Notes, 1993

Amendments. See Vergis, 199 F.R.D. 216 (S.D. Ohio 2000).

Indeed, just as in Vergis, J.C. Jacobson had notice of the suit prior to the expiration of the 120-day limit, having received a letter from the undersigned enclosing the Amended Complaint, see Exhibit "F", and having spoken with the undersigned about the matter on June 19. Since the applicable statute of limitations would bar refiling of the action against J.C. Jacobson and since he knew of the suit prior to the expiration of the 120-day limit, this court should issue an order directing that service upon him be made by a specified time so the case against J.C. Jacobson can be decided on the merits. Since Plaintiff has already sent a proposed summons to the court and knows no reason why J.C. Jacobson could not be served expeditiously, Plaintiff suggests 20 days from issuance of the summons.

That having been said, good cause does exist for extending the time period to serve J.C. Jacobson. Quite frankly, the reason J.C. Jacobson was not served was attorney inadvertence due to the large number and changes in the identity of the defendants. This can be seen by the fact that co-defendant J.D. Jacobson was timely served, yet Plaintiff failed to even prepare a proposed summons for J.C. Jacobson until, ironically, earlier the same day the undersigned received the subject Order to Show Cause. Attorney inadvertence can be considered by the court. Floyd v. United States, 900 F.2d 1045 (7th Cir. 1990).

It is also not irrelevant to consider prejudice to the plaintiff and lack of prejudice to the defendant. Tso v Delaney,

969 F.2d 373 (7th Cir. 1992); Boltes v. Entex, 158 F.R.D. 110 (S.D. Tex. 1994). In the instant case, Plaintiff will be severely prejudiced since her claim against J.C. Jacobson will be time-barred. J.C. Jacobson will not be prejudiced since he has been aware of suit since soon after its filing, service upon the other defendants in this action either has been recent or has not yet occurred yet, and not a single defensive paper has been filed in this action.

IV. Conclusion

J.D. JACOBSON, RSKCo, Kelly, Continental, and Attention have now been served. J.C. Jacobson, P.A. and RSM, P.A. were not parties until September 4, so the 120-day period did not even begin to run against them until that date, and since they were not parties, JSM could not be served.

As for J.C. Jacobson, he has been aware of this suit since shortly after its filing, and will not be prejudiced by a granting of additional time. Plaintiff will, on the other hand, be severely prejudiced, since her claim against J.C. Jacobson will be time-barred. This court should allow Plaintiff additional time to serve J.C. Jacobson so Plaintiff's claim against him can be decided on the merits.

VERIFICATION

I, Andrew Spark, declare as follows:


I am the attorney for the plaintiff in the above-entitled action.

I have read the above and know its contents. The matters stated above are true of my own knowledge.

The enclosed letter to J.C. Jacobson is a true and correct copy of a letter I sent him.

I declare under penalty of perjury under the laws of the State of Florida that the above is true and correct.


Executed on September 23, 2002, at Sarasota, Florida.



Andrew Spark

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing by placing same in the U.S. mail, first-class postage pre-paid, addressed to Attention, LLC, Kelly Services, Inc., and RSKCo. Services, Inc., all c/o CT Corporation System, Registered Agent, 1200 S. Pine Island Rd., Plantation, FL, 33324, Continental Casualty Co., c/o Florida Insurance Commissioner, Registered Agent, The Capitol, Tallahassee, FL, 32301, and Justin D. Jacobson, P.O. Box 19359, Plantation, FL, 33318-0359, this 23 day of September, 2002.



Andrew B. Spark
FL Bar No: 0899811
LawServ, Chartered
Attorney for PLAINTIFF
2033 Main St., Ste. 106
Sarasota, FL 34237
(941) 954-0744
FAX: (941) 953-6260
abspark@msn.com

cc: Michele Stocker, Esq.
Sal Sicuso, Esq.

EXHIBIT "A"

VERIFIED RETURN OF SERVICE

JUSTIN D. JACOBSON

UNITED STATES DISTRICT COURT
GRAHAM GERBER
THE SOUTHERN DISTRICT OF FLORIDA

CASE: 02-60636 CIV

CIVIL DIVISION

BARBARA NAILS

SUMMONS IN A CIVIL CASE

20 DAY / COMPLAINT

vs.

JAMES CARY JACOBSON, JUSTIN D. JACOBSON
ROBIN S. MOSELLE, AS COPARTNERS ETAL

Pursuant to the request of Andrew Bennett Spark, 2033 Main Street, Suite 106, Sarasota, FL. BILL GREENBERG SPECIAL SERVICES, INC., received this process on August 23, 2002 at 01:36 P.M.

I, MARION D. PETERS served same on JUSTIN D. JACOBSON, at 1078 NW 96TH AVE, PLANTATION, FL on **SEPTEMBER 4, 2002 at 03:50 P.M.**

INDIVIDUAL SERVICE

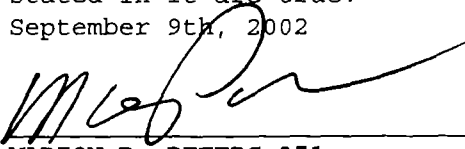
By serving the within named person a copy of the above named document(s). FS 48.031(1)

MILITARY STATUS: Based upon inquiry of party served, defendant is not in the military service of the United States.

I **ACKNOWLEDGE** that I am authorized to serve process, in good standing in the jurisdiction wherein this process was served and I have no interest in the above action.

Under penalties of perjury, I
declare that I have read the
forgoing document and that the facts
stated in it are true.
September 9th, 2002

BILL GREENBERG SPECIAL SERVICES, INC.
18450 NE 2ND AVENUE
MIAMI, FL 33179
OFFICE (305) 770-4438


MARION D. PETERS 351

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AFFIDAVIT OF LOST ORIGINAL

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF FLORIDA

CASE: 02-60636 CIV GRAHAM GE
CIVIL DIVISION

BARBARA NAILS

vs.

JAMES CARY JACOBSON, JUSTIN D. JAC
ROBIN S. MOSELLE, AS COPARTNERS E

The original Summons In A Civil Case going to Justin D. Jacobson has been lost.

The foregoing instrument was acknowledged
before me this 09/09/02
by Esilda Potts
who is personally known to me.

Vanessa Ichaso
NOTARY PUBLIC

[Signature]
SIGNATURE

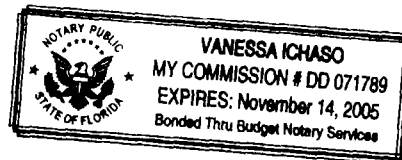


EXHIBIT "B"

VERIFIED RETURN OF SERVICE

RSKCO SERVICES, INC. C/O CT CORPORATION SYSTEM, REGISTERED AGENT

UNITED STATES DISTRICT COURT
GRAHAM/GERBER
THE SOUTHERN DISTRICT OF FLORIDA

CASE: 02-60636 CIV

CIVIL DIVISION

BARBARA NAILS

SUMMONS IN A CIVIL CASE
20 DAY / COMPLAINT

vs.

JAMES CORY JACOBSON, JUSTIN D.
JACOBSON, ROBIN S. MORELLE, AS ET AL

Pursuant to the request of Andrew Bennett Spark, 2033 Main Street, Suite 106, Sarasota, FL. BILL GREENBERG SPECIAL SERVICES, INC., received this process on September 3, 2002 at 01:40 P.M.

I, MARION D. PETERS served same on RSKCO SERVICES, INC. C/O CT CORPORATION SYSTEM, REGISTERED AGENT, at 1200 S. PINE ISLAND RD., PLANTATION, FL 33324 on **SEPTEMBER 4, 2002 at 01:40 P.M.**

CORPORATE SERVICE

By serving a copy of the above document(s) to C T CORPORATION SYSTEMS as REGISTERED AGENT or any employee of defendant corporation in the absence of any superior officer as defined in Florida Statute, Section 48.081 when defendant's corporation does not keep a registered agent present as required by F.S., Section 48.091.

COMMENTS

COPIES LEFT WITH ANNE BOUTILIER AS THE AUTHORIZED PERSON TO ACCEPT.

I **ACKNOWLEDGE** that I am authorized to serve process, in good standing in the jurisdiction wherein this process was served and I have no interest in the above action.

Under penalties of perjury, I
declare that I have read the
forgoing document and that the facts
stated in it are true.
September 9th, 2002

BILL GREENBERG SPECIAL SERVICES, INC.
18450 NE 2ND AVENUE
MIAMI, FL 33179
OFFICE (305) 770-4438


MARION D. PETERS 351

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EXHIBIT "C"

VERIFIED RETURN OF SERVICE

KELLY SERVICES INC. C/O CT CORPORATION SYSEM, REGISTERED AGENT

UNITED STATES DISTRICT COURT
GRAHAM GERBER
THE SOUTHERN DISTRICT OF FLORIDA

CASE: 02-60636 CIV

CIVIL DIVISION

BARBARA NAILS

SUMMONS IN A CIVIL CASE
20 DAY / COMPLAINT

vs.

JAMES CARY JACOBSON, JUSTIN D. JACOBSON
ROBIN S. MOSELLE, AS COPARTNERS ETAL

Pursuant to the request of Andrew Bennett Spark, 2033 Main Street, Suite 106, Sarasota, FL. BILL GREENBERG SPECIAL SERVICES, INC., received this process on August 23, 2002 at 01:36 P.M.

I, MARION D. PETERS served same on KELLY SERVICES INC. C/O CT CORPORATION SYSEM, REGISTERED AGENT, at 1200 S PINE ISLAND ROAD, PLANTATION, FL 33324 on AUGUST 27, 2002 at 01:30 P.M.

CORPORATE SERVICE

By serving a copy of the above document(s) to C T CORPORATION SYSTEMS as REGISTERED AGENT or any employee of defendant corporation in the absence of any superior officer as defined in Florida Statute, Section 48.081 when defendant's corporation does not keep a registered agent present as required by F.S., Section 48.091.

COMMENTS

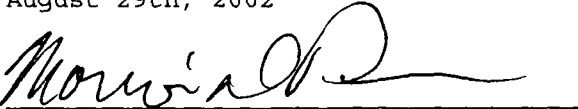
COPIES LEFT WITH ANNE BOUTILIER AS THE AUTHORIZED PERSON TO ACCEPT.

I ACKNOWLEDGE that I am authorized to serve process, in good standing in the jurisdiction wherein this process was served and I have no interest in the above action.

Under penalties of perjury, I
declare that I have read the
forgoing document and that the facts
stated in it are true.

August 29th, 2002

BILL GREENBERG SPECIAL SERVICES, INC.
18450 NE 2ND AVENUE
MIAMI, FL 33179
OFFICE (305) 770-4438



MARION D. PETERS 351

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EXHIBIT "D"

United States District Court

Southern

DISTRICT OF

FLORIDA

Barbara Nails
Plaintiff

SUMMONS IN A CIVIL CASE

^{V. Jacobson}
James Gary Jacobson, Justin D. Jacobson,
Robin S. Morelle, as copartners doing
business as Jacobson Sobo & Morelle,
Attention, LLC, Kelly Services, Inc.,
and Does 1 through 3

CASE NUMBER: 02-60636-CIV-
Graham/Gerber

TO: (Name and address of defendant)

Continental
Continental Casualty Co.,
c/o Florida Insurance Commissioner, Registered
Agent
The Capitol
Tallahassee, FL 32301

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Andrew Bennett Spark
Centerpointe
2033 Main Street, Suite 106
Sarasota, Florida 34237
(941) 954-0744

amended

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

Clarence Maddox

AUG 23 2002

CLERK

DATE

Alfonse Huarez

(BY) DEPUTY CLERK

RETURN OF SERVICE

Service of the Summons and Complaint was made by me ¹ **	DATE 9/3/2002 11:10 AM
NAME OF SERVER (PRINT) Chris J. Colson, Certified Process Srvr #142, 2nd Jud Crct of Florida, Leon Co.	TITLE
Check one box below to indicate appropriate method of service	

- ☒ Served personally upon the defendant. Place where served: 545 Larson Bldg., Tallahassee, FL
 By Serving: Florida Insurance Commissioner as Statutory Agent for service
c/o Tonya Crittenden, Service Clerk, Pursuant to F.S. 48.151(3).
☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
 Name of person with whom the summons and complaint were left: _____
- ☐ Returned unexecuted: _____
- ☐ Other (specify): _____

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL
	\$25.00	\$25.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on 9/4/2002
 Date

[Signature]
 Signature of Server

 Address of Server



www.Serveit.com
 Capital Area Process Service
 Tallahassee's Premier Agency
 1212 Tung Hill Drive
 Tallahassee, FL 32317-9545

**Also Served: Check #1288 for DOI Fee
 Pursuant to F.S. 624.502

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

EXHIBIT "E"

VERIFIED RETURN OF SERVICE
ATTENTION, LLC C/O CT CORPORATION SYSTEM, R.A.

UNITED STATES DISTRICT COURT
GRAHAM/GARBER
THE SOUTHERN DISTRICT OF FLORIDA

CASE: 02-60636 CIV

CIVIL DIVISION

BARBARA NALLS

SUMMONS IN A CIVIL CASE
20 DAY / COMPLAINT

vs.

JAMES CARY JACOBSON, JUSTIN D. JACOBSON
ROBIN S. MOSELLE, AS CO-PARTNERS ET AL

Pursuant to the request of Andrew Bennett Spark, 2033 Main Street, Suite 106, Sarasota, FL. BILL GREENBERG SPECIAL SERVICES, INC., received this process on July 1, 2002 at 01:04 P.M.

I, JEAN-MARIE JEAN-BAPTISTE served same on ATTENTION, LLC C/O CT CORPORATION SYSTEM, R.A., at 1200 S. PINE ISLAND RD., PLANTATION, FL 33324 on JULY 8, 2002 at 11:40 A.M.

CORPORATE SERVICE

By serving a copy of the above document(s) to C T CORPORATION SYSTEMS as REGISTERED AGENT or any employee of defendant corporation in the absence of any superior officer as defined in Florida Statute, Section 48.081 when defendant's corporation does not keep a registered agent present as required by F.S., Section 48.091.

COMMENTS

COPIES LEFT WITH ANNE BOUTILIER AS THE AUTHORIZED PERSON TO ACCEPT.

I ACKNOWLEDGE that I am authorized to serve process, in good standing in the jurisdiction wherein this process was served and I have no interest in the above action.

Under penalties of perjury, I
declare that I have read the
forgoing document and that the facts
stated in it are true.
July 9th, 2002

BILL GREENBERG SPECIAL SERVICES, INC.
18450 NE 2ND AVENUE
MIAMI, FL 33179
OFFICE (305) 770-4438



JEAN-MARIE JEAN-BAPTISTE 379

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EXHIBIT "F"

LAW OFFICE OF
ANDREW BENNETT SPARK

CENTER POINTE
2033 MAIN STREET, SUITE 106
SARASOTA, FLORIDA 34237
(941) 954-0744
FAX: (941) 953-6260
abspark@msn.com

Admitted to practice law in Florida, New York, and New Jersey

May 24, 2002

James Cary Jacobson, Esq.
Jacobson Sobo & Moselle
P.O. Box 19359
Plantation, FL 33318-0359

RE: Nails/Jacobson
Our file # 1344
Case No. 02-60636-CIV-GRAHAM/GARBER

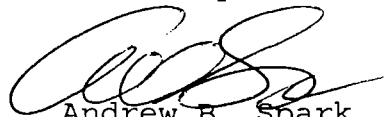
Dear Mr. Jacobson:

Enclosed is an Amended Complaint recently filed against you and your firm.

I am under the impression that this matter can be resolved on a win-win basis for our clients, you, your partners, and am working toward that end, though it is expected that you will make a reasonable offer to settle the claims against you and your partners. Please contact me within 10 days to discuss such a reasonable offer. In the meantime, I will attempting to resolve this matter with the insurer, with a goal being for that resolution to include payment to your client through your office.

I look forward to hearing from you. If you have any questions, please do not hesitate to contact me.

Sincerely,



Andrew B. Spark

enc.